

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

FILED/ACCEPTED

NOV 21 2008

*Federal Communications Commission
Office of the Secretary*

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(The Dalles, Tualatin, Eugene, Albany, Lebanon,)
Paisley, and Diamond Lake, Oregon and)
Goldendale, Washington))

MB Docket No. 05-10
RM-11279

To: The Office of the Secretary
Attention: Chief, Audio Division, Media Bureau

OPPOSITION TO MOTION FOR STAY

Portland Broadcasting, LLC ("PB"), licensee of Station KXPC-FM, Lebanon, Oregon, Bicoastal Media Licenses IV, LLC (successor in interest to Columbia Gorge Broadcasters, Inc. and M.S.W. Communications, LLC), licensee of Station KACI-GM, The Dalles, Oregon and Station KMSW(FM), The Dalles, Oregon and Extra Mile Media, Inc., licensee of Station KHPE(FM), Albany, Oregon (collectively, the "Joint Petitioners"), pursuant to Section 1.45(d) of the Commission's rules, hereby oppose the Motion for Stay filed by Cumulus Licensing LLC ("Cumulus"). In support of their position, the Joint Petitioners submit the following:

Joint Petitioners filed a Petition for Rule Making in the above-referenced proceeding that would result in the allotment of first broadcast services to two communities of license as well as significant service to underserved areas. Part of the proposal involves modifying the licensed facilities of Cumulus Station KNRQ-FM,

Eugene, Oregon from Channel 250C to Channel 300C. Cumulus has repeatedly argued throughout the rule making that such a change would create a hazard to air navigation and, the Media Bureau, in its *Report and Order*¹, dismissed the Joint Petitioners' rule making proposal based on the issuance of a Notice of Presumed Hazard by the Federal Aviation Administration (the "FAA") stating that the proposed allotment of Channel 300C at the KNRQ-FM transmitter site would have an adverse physical or electromagnetic interference (EMI) effect upon navigable air space or air navigation facilities. Based on the FAA Notice of Presumed Hazard, the Bureau concluded that use of Channel 300C at Station KNRQ-FM's "current transmitter site would have a negative impact on air/ground communications and cause unacceptable interference to the Eugene, Oregon Instrument Landing System (ILS) operated by the FAA."²

Joint Petitioners filed a Petition for Reconsideration of the adverse Bureau ruling. Joint Petitioners stated in their Petition what they had consistently contended, that any concerns expressed by Cumulus regarding changes in the operating channel of KNRQ-FM could easily be resolved by having the FAA make localizer frequency changes, a not unusual manner of proceeding.³ For its part, Cumulus repeatedly cited the FAA adverse air hazard determination in support of its position that Joint Petitioners' rule making

¹ 21 FCC Rcd 10017 (MB 2006).

² 21 FCC Rcd at 10020.

³ See Joint Petitioners' Comments on Order to Show Cause, filed May 2, 2006 p.4n. 4; Petition for Reconsideration, filed October 27, 2006 at pp. 2-3 and Engineering Statement; Reply to Opposition to Petition for Reconsideration, filed January 18, 2007 at pp. 2-4 and Engineering Statement.

proposal must be dismissed and the proceeding terminated.⁴ Moreover, Cumulus consistently argued that the FAA considered there to be no solution to the EMI problem at the Eugene Airport and that the FAA adverse determination with respect to Joint Petitioners' proposal would never be changed. Cumulus even challenged the veracity of Joint Petitioners' claim that they were working with the FAA to resolve the problem.⁵

Consistent with Joint Petitioners' representation to the Commission, and directly contrary to Cumulus' repeated assertions that the FAA adverse air hazard determination would never be changed, on September 10, 2008, the FAA issued a Determination of No Hazard to Air Navigation with respect to the proposed allotment of Channel 300C at the KNRQ-FM antenna tower site. The Determination of No Hazard expressly noted that the previous electromagnetic interference concerns, which had led the Media Bureau to dismiss Joint Petitioners' proposal, had "been mitigated" due to the commitment to make localizer frequency changes at the Eugene, Oregon Airport. As such, "the FAA's EMI objection was removed" in view of the "mitigation of the identified EMI issues for any potential frequency change at the [KNRQ-FM] tower location." *See* Attachment. And,

⁴ *See eg.* Comments of Cumulus Licensing LCC to Order to Show Cause, filed May 2, 2006 at pp. 4-5 ("the FAA has concluded that the use of Channel 300 at the KNRQ transmitter site will create a hazard to air navigation as a result of the potential for electromagnetic interference, [and as such] in light of the FAA's determination that Channel 300C cannot be used without causing a hazard to air navigation, the Joint Petition must be dismissed, and this proceeding must then be terminated."); Opposition to Petition for Reconsideration, filed November 9, 2006 at p. 2 ("the Commission correctly dismissed [Joint Petitioners'] counterproposal due to the FAA's valid and very real concern of interference to navigation aids used at the Mahlon Sweet Field, which serves the Eugene area").

⁵ *See eg.* Cumulus Licensing, LLC, Opposition to Petition for Reconsideration, p. 7 ("the decision by the FAA...will not be changed, nor are the Joint Petitioners currently engaged in any proceedings at the FAA to do so"); Comments of Cumulus Licensing LLC to Order to Show Cause, Attachment 2 ("the Presumed Hazard will stand as a permanent decision").

in fact, the Eugene Airport ILS frequencies were actually changed in October 2008, as reported previously by Joint Petitioners.⁶

Cumulus subsequently has filed a Request with the FAA in the nature of a formal complaint under Section 13.5(a) of the FAA's rules ("Complaint"). Cumulus has asked the FAA to conclude that the third-party Reimbursable Agreement between the FAA and PB, whereby PB agreed to pay for ILS frequency changes at the Eugene Aiport, was not in the public interest and should be terminated notwithstanding the fact that the action contemplated by the Reimbursable Agreement, the change of ILS frequencies, has already been accomplished and the frequencies were successfully flight checked over one month ago. Cumulus has also requested that the Media Bureau stay, or otherwise hold in abeyance, further proceedings in this rule making proceeding until there is a final resolution of its request before the FAA to terminate the Reimbursable Agreement between PB and the FAA.

As Cumulus has previously recognized, a proponent of a stay request must "satisfy a heavy burden of persuasion."⁷ In considering whether to grant a stay, the Commission must balance: (1) the likelihood that the petitioner will prevail on the merits; (2) the likelihood that the petitioner will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Commission grants the stay; and (4) the public

⁶ See Opposition to Motion for Leave to File Supplement Opposition to Petition for Reconsideration, filed October 22, 2008 at p. 4 and Attachment A.

⁷ Cumulus Licensing LLC Opposition to Informal Objection, filed May 21, 2008 at p. 6.

interest in granting the stay. A petitioner must satisfy each of these tests in order to justify grant of a stay.⁸

Cumulus' stay request fails to satisfy the "heavy burden of persuasion." It is not supported by a convincing showing on any of the four prongs and, therefore, the request must be denied. Cumulus has not even begun to demonstrate a substantial likelihood of prevailing on the merits to warrant a stay. Cumulus seeks to manufacture an argument that, because it has filed its Complaint with the FAA attacking an Agreement which has already been carried out by the FAA, this somehow demonstrates that it will ultimately prevail. In fact, Cumulus is unable to provide much of any substantive support for its wishful thinking.

As noted, Cumulus has filed a Complaint with the FAA alleging that it should have been allowed to have commented on a third-party Agreement between PB and the FAA in which PB agreed to pay for ILS frequency changes. However, contrary to Cumulus' description, the Reimbursable Agreement between PB and the FAA was not an "FAA proceeding." Nor did it constitute a vehicle for one private party to gain advantage over another. To the contrary, the FAA made a determination that aviation safety would be improved with the significant reduction or elimination of existing interference at the Eugene Airport by changing ILS frequencies. The FAA did not change ILS frequencies in order to favor one party over another. Rather, it changed frequencies to advance

⁸ *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958), *modified*, *WMATA v. Holiday Tours, Inc.*, 559 F. 2d 841, 843 (D.C. Cir. 1977).

public aviation safety.⁹ The FAA has no interest in what FM channels FCC broadcast stations are assigned by the Commission. In that respect, the Determination of No Hazard to Air Navigation issued by the FAA states that the "Portland Broadcasting and Cumulus Media frequency assignment determinations will be accomplished by the FCC." *See* Attachment. Therefore, changing ILS frequencies at the Eugene Airport in order to increase aviation safety was not a decision subject to public comment. While Cumulus claims that there is no reported FAA or judicial decision supporting the FAA's refusal to permit Cumulus to comment on the Reimbursable Agreement, that can only be so because it has never been permitted and, until now, no party prior to Cumulus had claimed the right to participate in private contractual negotiations between the FAA and a third-party.

Moreover, while Cumulus expresses supreme confidence in its position at the FAA, it should be noted that Cumulus filed its Complaint with the FAA on September 2, 2008. One week later, on September 10, 2008, the FAA issued its Determination of No Hazard to Air Navigation regarding the KNRQ-FM channel changes. Cumulus filed a Supplement to its Complaint on October 1, 2008. The FAA was so impressed with Cumulus' arguments that it went ahead and implemented the change of ILS frequencies at the Eugene Airport three weeks later. While, unlike Cumulus, Joint Petitioners would not claim the ability to forecast an agency's decision, it certainly appears from its actions that the FAA is unlikely to grant Cumulus the relief which it seeks -- relief which would

⁹ Even Cumulus has acknowledged that operation by Station KHPE on its current channel (Channel 300) creates the potential for interference at the Eugene Airport. *See* Cumulus Licensing LLC, Opposition to Petition for Reconsideration, Attachment 2 ("it is true that this computer program indicates some EMI potential for KHPE-FM.").

involve going back and changing ILS frequencies at the Eugene Airport only weeks or months after the FAA had changed those same frequencies. Accordingly, Cumulus has totally failed to substantiate its claim that it will prevail on the merits in this case.

Likewise, Cumulus' allegations of irreparable harm are also deficient. To justify a stay, the alleged harm must be great, imminent and certain to occur unless the stay is granted.¹⁰ Cumulus has failed to demonstrate that it will suffer irreparable injury absent a stay. It offers speculation as to what could theoretically happen, but does not substantiate its claims that it will suffer actual injury.

At the same time, Cumulus has failed to make an affirmative demonstration of no harm to Joint Petitioners. Cumulus would delay this rule making proceeding an unknown amount of time based on its hope that the FAA someday will consider its Complaint, which even Cumulus acknowledges as unprecedented. Joint Petitioners should not have to incur needless delay in having their proposals considered by the Commission based on a hope and a wish.

Finally, Cumulus has failed to demonstrate that a stay would serve the public interest. In fact, staying this proceeding pending a decision by a separate Government Agency, which has expressed no interest in considering the matter raised by Cumulus, would affirmatively disserve the public interest. There is no way of knowing at this time

¹⁰ *Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 674 (D.C. Cir. 1985) (internal citations omitted)("[T]he injury must be both certain and great; it must be actual and not theoretical...the party seeking injunctive relief must show that '[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm'").

whether the duration of any proposed stay would be brief. Given that approval of Joint Petitioners' proposal would result in a first local service to two communities and a first local aural broadcast service to over 2,200 individuals, strong public interest factors favor reaching a determination with respect to Joint Petitioners' proposal as soon as possible.¹¹

¹¹ The cases cited by Cumulus are in no manner comparable to this proceeding. For example, the Commission stayed comparative broadcast hearings because the comparative criteria used to adjudicate those proceedings had been thrown out in Court. That is far different than staying an FCC proceeding because a petitioner has filed a highly unusual Complaint with another agency.

The Commission should deny Cumulus' request for a stay of this proceeding. As discussed above, Cumulus has not shown that it will prevail on the merits. Moreover, Cumulus has not shown that it will suffer irreparable harm but for a stay, while Joint Petitioners will be harmed by a further delay. Finally, a stay would harm the public interest because it would continue to foreclose individuals and communities from receiving a first broadcast service for an unknown amount of time.

Respectfully submitted,

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Dated: November 21, 2008

ATTACHMENT



Federal Aviation Administration
Air Traffic Airspace Branch, ASW-520
2601 Meacham Blvd.
Fort Worth, TX 76137-0520

Aeronautical Study No.
2007-ANM-102-OE
Prior Study No.
1997-ANM-802-OE

Issued Date: 09/10/2008

Kevin Terry
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**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Antenna Tower KNRQ-FM
Location:	Eugene, OR
Latitude:	44-00-07.00N NAD 83
Longitude:	123-06-54.00W
Heights:	373 feet above ground level (AGL) 1668 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure should continue to be marked and/or lighted utilizing paint/red lights.

See attachment for additional condition(s) or information.

This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power will void this determination. Any future construction or alteration, including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission if the structure is subject to their licensing authority.

If we can be of further assistance, please contact our office at (907) 271-5863. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2007-ANM-102-OE.

Signature Control No: 498959-103296684

(DNE)

Robert van Haastert
Specialist

Attachment(s)
Additional Information
Frequency Data
Map(s)

Additional information for ASN 2007-ANM-102-OE

Narrative for Aeronautical Study number: 2007-ANM-102-OE

This is a Portland Broadcasting, LLC, proposal to coordinate the frequency 107.9 MHz at 100 KW on the existing 373 AGL/1668 MSL tower. This is the KNRQ-FM antenna tower (Antenna Registration number 1033594) originally studied under aeronautical study number 1997-ANM-802-OE.

This tower and KNRQ-FM is owned by Cumulus Media, INC, which is currently on assigned frequency 97.9 MHz. Portland Broadcasting has proposed to the Federal Communications Commission (FCC) to operate on the Cumulus Media's 97.9 MHz assigned frequency and relocate Cumulus Media onto a new frequency, 107.9 MHz.

The proposal was received on 12 January 2007, assigned aeronautical study number 2007-ANM-102-OE, and a Notice of Presumed Hazard letter was written 1 February 2007 which identified the electromagnetic interference (EMI) FAA concern with the Instrument Landing System (ILS) frequency located at the Eugene/Mahlon Sweet Field (EUG), OR.

This identified EMI concern has been mitigated with the proponent's commitment in a Reimbursable Agreement to fund the EUG ILS and Localizer (ADE) frequency changes. The FAA's EMI objection was removed.

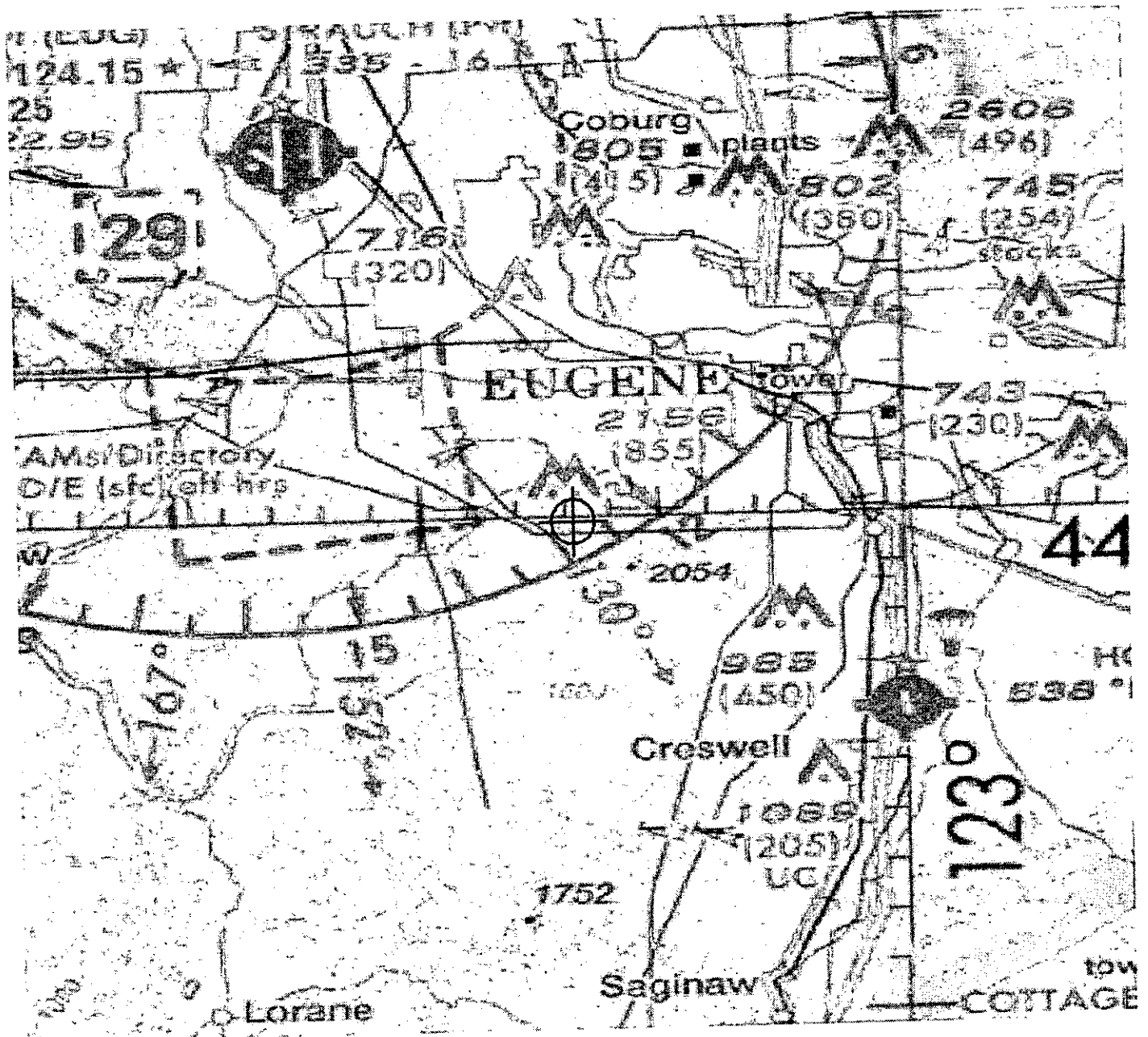
This FAA Determination deals with the mitigation of the identified EMI issues for any potential frequency change at this tower location. Portland Broadcasting and Cumulus Media frequency assignment determinations will be accomplished by the FCC.

-X-

Frequency Data for ASN 2007-ANM-102-OE

LOW FREQUENCY	HIGH FREQUENCY	FREQUENCY UNIT	ERP	ERP UNIT
107.9	107.9	MHz	100	KW

Sectional Map for ASN 2007-ANM-102-OE



CERTIFICATE OF SERVICE

I, Malinda L. Ellerman, hereby certify that on this 21st day of November, 2008, true and correct copies of the foregoing "Opposition to Motion for Stay" have been served via U.S. mail, postage prepaid, upon the following persons:

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